

NO. 47885-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

PROVIDENCE PHYSICIAN SERVICES CO.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH and
ROCKWOOD HEALTH SYSTEM D/B/A VALLEY HOSPITAL,

Respondents.

**RESPONDENT WASHINGTON STATE DEPARTMENT OF
HEALTH'S BRIEF**

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I. INTRODUCTION

Providence Physicians Services Corporation (Providence Physicians) requests this Court to expand a limited exemption in a Certificate of Need rule in a manner that would defeat the Legislature's intent that ambulatory surgery facilities (ASFs) be subject to Certificate of Need approval.

An ASF is a facility where outpatient surgery is performed in operating rooms outside a hospital. WAC 246-310-010(5). An entity seeking to open an ASF must first obtain a Certificate of Need from the Department of Health (Department). However, a facility is exempt from the Certificate of Need requirement when the facility (1) would be inside the offices of an individual or group practice of private physicians and (2) would be used only by those physicians. *Id.*

Providence Physicians planned to open an ASF, and claimed an exemption from the Certificate of Need law under WAC 246-310-010(5) because the facility would be used exclusively by Providence Physicians.

The Department properly denied the request for an exemption under WAC 246-310-010(5) because the exemption applies only when a facility's operating rooms are in the offices of "private" physicians who are engaged in "individual or group practice." Physicians with Providence Physicians are not private physicians in group practice, but rather they are

employees of Providence Health Services, which owns Providence Physicians and two Spokane-area hospitals. Allowing an exemption for hospital-controlled facilities located away from a hospital would hand hospitals an unfair advantage over non-hospital facilities which *are* required to obtain Certificate of Need approval, something the Legislature never intended when it made the establishment of ASFs subject to Certificate of Need review.

Moreover, the Department may interpret the WAC 246-310-010(5) exemption as not applying to hospital ASFs located off a hospital campus. The Department adopted this same interpretation in three cases prior to the Providence Physicians case. Contrary to Providence Physicians argument, the Department may apply this interpretation without having to adopt a new rule.

A Presiding Officer, a Review Officer, and a superior court judge have all upheld the Department's denial of a Private Practice Exemption to Providence Physicians. This Court should do likewise.

II. STATEMENT OF CASE

A. Certificate Of Need Law And The Private Practice Exemption

Health care providers must obtain a Certificate of Need from the Department prior to establishing certain types of facilities. RCW 70.38.105(4)(a). One type of facility requiring a Certificate of Need

is an ambulatory surgery facility (ASF). RCW 70.38.025(6). An ASF is a facility where surgical procedures are performed in operating rooms outside a hospital. WAC 246-310-010(5). However, the rule exempts a facility located “in the offices of private physicians or dentists, whether for individual or group practice, if privilege of using the facility is not extended to physicians or dentists outside of the individual or group practice.” This exemption is best characterized as a “Private Practice Exemption”.

Prior to 1996, WAC 246-310-010(5) exempted from Certificate of Need all ASFs that were controlled by a hospital. In 1996, the Department amended the rule to require approval of all “free-standing” ASFs. AR at 58-59. That meant that hospital-controlled operating rooms, located *outside* a hospital, became subject to Certificate of Need approval for the first time.

In 2008, 2009, and 2010, the Department issued three decisions that required Certificate of Need approval for hospital-controlled ASFs that were located outside a hospital for exclusive use by its own physicians. AR at 53-67, 257-59, 282. In the 2008 decision, a Presiding Officer reasoned that the Private Practice Exemption applied only to private practice physicians who treat their own patients in their own office. AR at 59. The Presiding Officer further reasoned that exempting

hospital-controlled ASFs, located outside a hospital, would defeat the purpose of the 1996 amendment to WAC 246-310-010(5). AR at 58-59.

B. Department Decision Denies Providence Physicians An Exemption From The Certificate Of Need Law

Providence Physicians requested the Private Practice Exemption under WAC 246-310-010(5) so that it could establish an ASF without having to obtain a Certificate of Need. Providence Health Services (Providence) is the sole shareholder of Providence Physicians. AR at 52. It owns and operates nine hospitals in Washington, including two in Spokane. AR at 50. Providence Physicians would lease the ASF in a medical park owned by Providence. AR at 321-23. The facility would be used exclusively by physicians of Providence Physicians, all of whom are employed by Providence. AR at 48, 51. Providence Physicians is not an individual or group practice. AR at 52.

Providence Physicians requested a determination from the Department under WAC 246-310-050 that its proposed ASF would be exempt from the Certificate of Need law under the Private Practice Exemption in WAC 246-310-010(5). AR at 319-64. The Department initially granted the exemption. AR at 315-18.

However, the Department's decision was not final and binding because any affected person had the right to request an adjudicative

proceeding to challenge the decision. AR at 317. An affected person, Rockwood Health Systems (Rockwood), requested an adjudicative proceeding to challenge the decision. AR at 1-2. Prior to hearing, the Department realized that its decision was not consistent with similar decisions from 2008, 2009, and 2010. The Department concluded that Providence Physicians was not entitled to a Private Practice Exemption. AR at 37-38.

On summary judgment, the Presiding Officer entered an Initial Order, holding that the Private Practice Exemption did not apply, and therefore the project required a Certificate of Need. AR at 223-31. Providence Physicians requested administrative review of the Initial Order. AR at 233-58. The Review Officer entered a Final Order affirming the Initial Order. AR at 299-303.

C. Superior Court Affirms Department's Decision

Providence Physicians petitioned for judicial review of the Final Order. Clerk's Papers (CP) at 4-48. Judge Erik D. Price of Thurston County Superior Court affirmed the Final Order. CP at 50-52. Judge Price agreed with the Review Officer that physicians in Providence Physicians were not "private" physicians under the dictionary definition of the "private practice." CP at 66-68. He found that granting an exemption to Providence Physicians would frustrate the purpose of the

1996 amendment to WAC 246-310-010(5) which made hospital-controlled ASFs, off the hospital campus, subject to Certificate of Need review. CP at 68. He also held that the Department could enforce its interpretation of WAC 246-310-010(5) without having to adopt a new rule. CP at 68-74. Providence Physicians appealed the case to this Court. CP at 53-57.

D. Providence Physicians Obtain Certificate Of Need

Following the Department's denial of a Private Practice Exemption, Providence Physicians applied for and received a Certificate of Need for its ASF. Providence Physicians' Brief (PPs' Br.) at 15. The approval is not yet final because Rockwood requested an adjudicative proceeding, challenging the approval, and the proceeding is still pending. Providence Physicians continue to pursue its appeal in this case, claiming an exemption from the Certificate of Need law.¹

III. STANDARD OF REVIEW

An appellate court reviews the agency's decision, and not the superior court's decision. *Odyssey Healthcare v. Dept. of Health*, 145 Wn. App. 131, 140, 185 P.3d 652 (2008). Certificate of Need

¹ As an exempt facility under WAC 246-310-010(5), Providence Physicians would not need Certificate of Need approval whenever it decided to add additional operating rooms to its facility. On the other hand, an exempt facility under WAC 246-310-010(5) must limit who may use the operating rooms at the facility. The limitation does not apply to a certificated facility.

decisions are presumed correct on judicial review, and the challengers bear the burden of overcoming that presumption. RCW 34.05.570(1); *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 49-50, 239 P.3d 1095 (2010).

Providence Physicians challenges the Department's interpretation of the Private Practice Exemption in WAC 246-310-010(5). On judicial review, the Department's interpretation of the Certificate of Need law is entitled to "substantial deference." *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 101, 187 P.3d 243 (2008); *Odyssey Healthcare v. Dep't of Health*, 145 Wn. App. 131, 142, 185 P.3d 652 (2008).

IV. ISSUES

A. WAC 246-310-010(5) states that an ASF facility is exempt from Certificate of Need review when the facility is located in the offices of private physicians, whether for individual or group practice, and use of the facility is not extended to physicians outside the individual or group practice. Does this exemption apply when the physicians using the facility are not private physicians and are not part of a group practice, but rather are employees of a corporation that is owned a hospital?

B. Providence Physicians claims that the Department may not enforce its interpretation of the Private Practice Exemption in

WAC 246-310-010(5) without first adopting a new rule incorporating its interpretation. Was this issue preserved for appeal when Providence Physicians failed to raise it in the adjudicative proceeding? If so, in an adjudicative proceeding, may the Department enforce its interpretation of the Private Practice Exemption in WAC 246-310-010(5) without adopting a new rule?

V. ARGUMENT

The Presiding Officer and the Review Officer correctly held that Providence Physicians is not entitled to a Private Practice Exemption under WAC 246-310-010(5) from the Certificate of Need law.²

A. Providence Physicians Is Not Exempt From Certificate Of Need Approval Under WAC 246-310-010(5) Because Providence Physicians, Being Employed By A Hospital, Are Not “Private” Physicians Engaged In A Group Practice

Certain types of “new” health care facilities require Certificate of Need approval. RCW 70.38.105(4)(a). One type is an ASF. RCW 70.38.025(6). The Department may adopt rules implementing the Certificate of Need law. RCW 70.38.135(3)(c). Under that authority, the Department adopted WAC 246-310-010(5), which states that the following type of facility is exempt from Certificate of Need review:

[A] facility in the offices of *private physicians* or dentists, whether for *individual or group practice*, if the privilege of

² The Review Officer’s Final Order incorporates by reference the Presiding Officer’s Initial Order. AR at 302. The argument, therefore, makes reference to both Orders.

using the facility is not extended to physicians or dentists outside the *individual or group practice*. [Emphasis added.]

Providence Physicians repeatedly characterizes this language as an “Exclusive Use Exemption.” This overbroad characterization is highly misleading. The exemption is better characterized as a Private Practice Exemption. It applies only when (1) a facility is in the offices of an individual or group practice of private physicians, and (2) only those physicians are entitled to use the facility. Contrary to Providence Physicians’ argument, the exemption does not apply whenever a facility merely restricts who may use the facility to perform surgery.

Rules of statutory construction apply to construction of agency rules. *Odyssey Healthcare v. Dep’t of Health*, 145 Wn. App. 131, 141, 185 P.3d 652 (2008). Dictionary definitions are used to glean the meaning of a law. *American Legion Post 32 v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991). Physicians with Providence Physicians are employed by Providence Health Services. AR at 48, 51. The Review Officer appropriately relied on a dictionary definition to determine the meaning of the Private Practice Exemption:

While the term ‘private’ [as used in WAC 246-310-010(5)] is not defined in statute or rule, the term ‘private practice’ is commonly understood to mean the ‘private practice of a profession (as medicine) independently and not as an employee’. [citing Merriam Webster’s on-line dictionary].

PPSC physicians are not in independent, or private, practice.

AR at 302.³ In addition, rules of statutory construction require that a law be given its plain meaning. *State v. Evans*, 177 Wn.2d 168, 192, 289 P.3d 724 (2013). The Presiding Officer noted that physicians in exempt facilities must be organized as a “group practice.” AR at 228. In applying for an exemption, Providence Physicians admitted that it was not a group practice. AR at 52. And, in the adjudicative proceeding, Providence Physicians failed to show how a collection of hospital-employed physicians, in a hospital-owned corporation, constitutes a “group practice.” Hence, the plain group-practice language of WAC 246-310-010(5) disqualifies Providence Physicians from receiving an exemption from the Certificate of Need law.

Furthermore, the Presiding Officer held that exemptions to a law should be “construed narrowly.” AR at 229. This holding is supported by case law. *Swinomish Indian Tribal Cmty. v. Dep’t of Ecology*, 178 Wn.2d 571, 582, 311 P.3d 6 (2013); *Welch v. Sutherland Corp.*, 134 Wn.2d 629, 636, 952 P.2d 162 (1998); *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999). Providence Physicians’

³ The Review Officer also noted that Providence Physicians is owned by Providence Health Services. AR at 302. However, she did not hold that physicians must actually own the facility in order to claim a Private Practice Exemption under WAC 246-310-010(5).

interpretation is invalid because it *broadly* construes the Private Practice Exemption to apply to a facility used by hospital-employed physicians who are not organized as a group practice.

Under these rules of construction, the Department correctly held that Providence Physicians does not qualify for a Private Practice Exemption under WAC 246-310-010(5). As stated above in Section III, the Department's interpretation of the rule is entitled to substantial deference from this court.

B. The Department's Interpretation Of WAC 246-310-010(5) Is Supported By Previous Department Decisions, And By The 1996 Amendment To The Rule

Providence Physicians note that the Department in 1999, 2002, and 2013, granted a Certificate of Need exemption under WAC 246-310-010(5) to hospitals that proposed establishing outpatient operating rooms for use by its own physicians. PPs' Br. at 7-8, 27. These decisions were not challenged, and so were not subject to an adjudicative or judicial proceeding.

Providence Physicians fail to acknowledge that the denial of an exemption is consistent with three other Department decisions in 2008, 2009, and 2010. The 2008 MultiCare decision (AR at 53-58), referenced in the Presiding Officer's decision in the Providence Physicians' case

(AR at 228), is critically important because it is the Department's only *litigated* case on this issue.

MultiCare, which operates three hospitals in Pierce County, formed an entity of MultiCare physicians, and sought to establish an ASF away from a hospital. Because the facility would be exclusively used by its physicians, MultiCare, like Providence Physicians, argued that the facility was exempt from CN review under WAC 246-310-010(5). AR at 55-56. A Department Presiding Officer disagreed, holding that MultiCare physicians were not "private" physicians, and therefore the facility would not be entitled to an exemption under WAC 246-310-010(5). AR at 59-61.

The Presiding Officer relied in part on a 1996 amendment to the ASF definition in WAC 246-310-010(5). The earlier version of the rule excluded from Certificate of Need review hospital operating rooms *on and off* the hospital campus. AR at 58-59. This broad exclusion gave hospitals an unfair advantage over non-hospital facilities that were required to obtain Certificate of Need approval for operating rooms. In 1996, the Department amended the ASF definition to apply to all "free standing" facilities, which meant that operating rooms located *outside* a hospital became subject to Certificate of Need review for the first time. AR at 42, n.1-2. The Presiding Officer noted that this amendment

“leveled the playing field” for hospital and non-hospital ASFs. AR at 59.

In rejecting an exemption for MultiCare, the Presiding Officer concluded:

The ‘group practice’ exemption for the CN regulation was intended to assist the private practice physician for the treatment of their own patients in their own offices. An interpretation of WAC 246-310-010 that would permit large, non-physician health care entities, would create an enormous exemption for hospitals or other non-physician corporations that would defeat the very purpose of the CN law of ambulatory surgical centers.⁴

Finally, following the MultiCare decision, two other Department decisions—Peace Health (2009) and Seattle Children’s (2010)—similarly denied an exemption to a hospital-owned operating room facility that would be used exclusively by physicians employed by the hospital. AR at 53-57, 157-59, 282.

Providence Physicians argues that the MultiCare case is distinguishable because the hospital did not create a separate legal entity that requested a Private Practice Exemption. PPs’ Br. at 28, n.6. However, what matters is that Providence Health Services owns Providence Physicians. AR at 52. Providence Health Services cannot qualify Providence Physicians for an exemption simply by making Providence Physicians a separate legal entity. A legal restriction may not

⁴ MultiCare petitioned for judicial review of the Department’s decision. Judge Christine A. Pomeroy upheld the decision. AR at 67-68. The MultiCare decision was reversed on jurisdictional grounds by the Court of Appeals, which did not address the merits of the case. AR at 225, 281.

be interpreted in a manner that “emasculates” the restriction by exalting “form over substance.” *Rouse v. Peoples Leasing Co.*, 96 Wn.2d 722, 724, 638 P.2d 1245 (1982). *See also CalPortland Co., v. LevelOne Concrete Co.*, 180 Wn. App. 379, 395, 34 P.3d 1262 (2014). Giving substance to WAC 246-310-010(5), a hospital corporation is not entitled to a Private Practice Exemption for an ASF, even if the corporation places the ASF under a separate legal entity. The law cannot be so easily evaded by a hospital corporation.

In short, contrary to Providence Physicians’ claim, there was precedent for requiring the Providence Physicians facility to obtain Certificate of Need approval.

C. The South Carolina *Amisub* Decision Is Not Controlling And It Does Not Support Providence Physicians’ Argument

Providence Physicians incorrectly relies on *Amisub of S.C. Inc., v. Dep’t of Health & Env’tl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013). In that case, the South Carolina Supreme Court upheld an agency decision that a hospital-owned urgent care center in the office of licensed private physicians was not subject to Certificate of Need approval. PPs’ Br. at 18-20.

The court in *Amisub* dismissed the appeal on jurisdictional grounds, but nevertheless opined that the project did not require

Certificate of Need approval. *Id.* at 597, n.16. The court noted that, in South Carolina, facilities in the offices of private physicians, whether in individual or group practice, were generally exempt from the Certificate of Need law.

However, the court's opinion did not rely solely on the fact that the urgent care center would be in the offices of private physicians. The court first noted that, in South Carolina, urgent care centers are not subject to the Certificate of Need law, but hospitals are. *Id.* The court found that urgent care centers fail to meet the definition of a hospital because they do not provide overnight care. *Id.* Given that urgent care centers were unreviewable under the Certificate of Need law, the court understandably concluded that a hospital's ownership of an urgent care center did not transform the project into one requiring Certificate of Need approval. *Id.*

In Washington, as in South Carolina, hospitals are subject to Certificate of Need review. RCW 70.38.105(4)(a); RCW 70.38.025(6). Under the reasoning in *Amisub*, if there were no requirement for Certificate of Need review of an ASF, then Certificate of Need approval of the Providence Physicians facility would not be required based on the fact that Providence Health Services (a hospital entity) would own the facility. But the Department is not subjecting the Providence Physicians ASF facility to Certificate of Need review because it is part of a hospital.

Instead, the facility is subject to review because ASFs in Washington—unlike urgent care centers in South Carolina—are separately subject to review.

The court's opinion contained no substantive discussion on whether a hospital-owned facility may be considered as in the offices of private physicians in individual or group practice. As discussed above, the Department has held that, for purposes of the WAC 246-310-010(5) exemption, such a facility is *not* in the offices of private physicians for individual or group practice. This holding is entitled to substantial deference from the court.

Finally, in *Amisub*, the hospital-owned entity successfully resisted an attempt to make its establishment of an urgent care center subject to Certificate of Need review when the same undertaking by a non-hospital was exempt for review. *Id.* In Providence Physicians' case, the exact opposite is happening: a hospital-owned facility is attempting to establish a free-standing ASF without Certificate of Need review when the same undertaking by a non-hospital would be subject to review. As explained above, establishing equal treatment of hospital and non-hospital facilities was precisely the point of the 1996 amendment to WAC 246-310-010(5).

In conclusion, the *Amisub* decision from South Carolina is not controlling and not supportive of Providence Physicians' argument.

D. Rule-Making Is Not Required For The Department To Deny An Exemption To Providence Physicians

Providence Physicians notes that Department decisions in 1999, 2002, and 2013, granted a Private Practice Exemption under WAC 246-310-010(5) to off-site operating room facilities owned by hospitals.

Based on these prior decisions, Providence Physicians' lead argument is that the Department's more-restrictive interpretation of the Exemption constitutes a "New Requirement" that may not be imposed without first being adopted in a new rule. PPs' Br. at 17-23. A "rule", which must be adopted in accordance with RCW 34.05, is defined to include "any agency order, directive, or regulation of general applicability . . . which establishes, alters, or revokes any [licensing] qualifications or standards."

The court should not consider this argument because it was not raised in the adjudicative proceeding and therefore was not preserved for appeal. *Kitsap Alliance of Prop. Owners v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 255 P.3d 696 (2011); *Edelman v. State*, 160 Wn. App. 294, 248 P.3d 581 (2011).

But even if this Court considers this issue, Providence Physicians "New-Requirement" argument should be rejected because it is based on a

flawed premise that an agency may not change its interpretation of a law without first adopting a new rule. In *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998), the court held that an agency may change its interpretation of a licensing requirement *if* the changed interpretation is consistent with the law, as there is no “vested right” to an incorrect interpretation of the law. The court rejected an argument that a correct change in an agency interpretation of a law requires the agency to adopt the change in rule. *Id.* at 600. Providence Physicians cites no appellate case holding to the contrary. The Department’s interpretation of the Private Practice Exemption in WAC 246-310-010(5) does not impose a *new* requirement, but rather correctly enforces an *existing* requirement.

Providence Physicians reliance on *Failor’s Pharm. v. Dep’t of Soc. and Health Servs.*, 125 Wn.2d 488, 886 P.2d 147 (1994) is misplaced. PPs’ Br. at 19. The court held that an agency’s Medicaid reimbursement schedule met the definition of a rule, and so could not be implemented without the agency first adopting the schedule in a rule. Unlike Providence Physicians’ case, *Failor’s Pharm.* did not involve whether a change in an agency’s interpretation of an existing rule required the adoption of a new rule.

Simply put, a dispute over the meaning of a law may be resolved in an adjudicative proceeding. *Budget Rent A Car v. Dep’t of Licensing*,

144 Wn.2d 889, 898, 31 P.3d 1174 (2001); *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 54, 121 P.3d 731 (2005). This is precisely what occurred in both the 2008 MultiCare case and Providence Physicians' case. Providence Physicians simply disagrees with the outcome of the adjudicative proceeding which established the Department's interpretation of the Private Practice Exemption in WAC 246-310-010(5).

And even if a change of an agency interpretation of a rule did require adoption of a new rule, the superior court held that a new rule would not be required because the Providence Physicians decision is actually consistent with the Department's three decisions in MultiCare, Peace Health, and Seattle Children's, and so does not impose a "new" requirement. CP at 71-72.

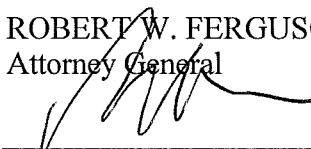
VI. CONCLUSION

Based on the foregoing, the Department of Health respectfully requests the Court to uphold the decision that Providence Physicians is not exempt under WAC 246-310-010(5) from the requirement for Certificate of Need approval of its proposed ambulatory surgery facility.

Department's interpretation of the rule may be applied without requiring the Department to adopt a new rule.

RESPECTFULLY SUBMITTED this 23rd day of November, 2015.

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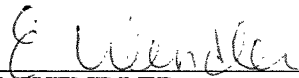
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